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7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE EASTERN DISTRICT OF CALIFORNIA
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11 UNITED STATES OF AMERICA,

12 Respondent,

No. 2:05-cr-0128 LKK AC

13 vs.

14 JAMES S. KALFSBEEK

15 Movant.

ORDER

16 _____/
17 In this case, petitioner James S. Kalfsbeek seeks relief under 28 U.S.C. § 2255
18 from the sentence of 120 months in custody that was imposed by this court on February 23, 2010
19 following his conviction for conspiracy, in violation of 18 U.S.C. § 371; mail fraud, in violation
20 of 18 U.S.C. §§ 1341, 1342; wire fraud, in violation of 18 U.S.C. §§ 1343, 1342; and money
21 laundering, in violation of 18 U.S.C. §§ 1956(a)(1)(B)(I) and 1956(a)(2). Presently pending
22 before the court are two motions filed by petitioner on November 16, 2012: a motion for leave to
23 conduct discovery and a motion for appointment of counsel. Respondent has not filed a response
24 to either motion. Also before the court is respondent's request for a finding that petitioner
25 waived the attorney-client privilege.

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1 RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

2 Following a jury trial, petitioner was found guilty on June 10, 2009 of conspiracy,
3 mail fraud, wire fraud, and money laundering. On February 23, 2010, petitioner was sentenced
4 to 120 months imprisonment followed by 36 months of supervised release. Judgment was
5 entered on March 8, 2010, and an appeal was taken. On appeal, petitioner challenged the
6 sufficiency of evidence as to his money laundering charges only and also brought a claim for
7 procedural error related to his review of the presentence report. See Doc. No. 429. On March 6,
8 2012, the Ninth Circuit Court of Appeals affirmed the decision of the district court.

9 On August 16, 2012, petitioner filed a motion to vacate, set aside or correct
10 sentence pursuant to 28 U.S.C. § 2255, bringing three claims for relief: (1) ineffective assistance
11 of trial counsel for trial counsel's alleged failure to properly prepare a defense, to object at trial,
12 to request or negotiate a plea bargain, and to properly investigate and research the case; (2)
13 prosecutorial misconduct for the prosecutor's admission of evidence concerning Sovereign
14 Citizenship; and (3) ineffective assistance of appellate counsel for appellate counsel's failure to
15 raise these issues on appeal. In its opposition, the government argues the merits of petitioner's
16 prosecutorial misconduct claim and also asks the court to find that petitioner waived the
17 attorney-client privilege by virtue of his ineffective assistance of counsel claims. The
18 government makes this request so that it may conduct discovery in order to adequately litigate
19 these claims. Plaintiff has filed a traverse.

20 DISCUSSION

21 A. Attorney-Client Privilege

22 In this habeas proceeding, petitioner contends that trial counsel failed to properly
23 prepare a defense, to object at trial, to request or negotiate a plea bargain, and to properly
24 investigate and research the case. He also asserts that his appellate counsel failed to raise these
25 issues on appeal. In its opposition to petitioner's motion, respondent seeks an order finding that
26 petitioner waived the attorney-client privilege by asserting claims for ineffective assistance of

1 counsel. Respondent argues here that it has a substantial basis for concluding that petitioner was
2 uncooperative with his defense counsel and that it cannot fully develop the facts of these claims
3 without obtaining from the defense attorneys their “oral and written communications with the
4 defendant and . . . any evidence supporting their effective performance in this case.” Opp’n at
5 22.

6 In support of its motion, respondent cites Bittaker v. Woodford, 331 F. 3d 715
7 (9th Cir. 2003), arguing that Bittaker stands for the proposition that a section 2255 motion based
8 on ineffective assistance of counsel constitutes a waiver of the attorney-client privilege. Though
9 the court in Bittaker held that a claim based upon ineffective assistance of counsel impliedly
10 waives the attorney-client privilege, it does not follow that a blanket waiver is automatically
11 effected by the presentation of the claim or that discovery of all communications between
12 movant and his former attorneys is permitted. The filing of a section 2255 motion alleging
13 ineffective assistance of counsel does not result in a complete waiver of the attorney-client
14 privilege. Rather, the holder of the privilege impliedly waives the privilege only “to the extent
15 necessary to give [respondent] a fair opportunity to defend against [the particular claim].”
16 Bittaker, 331 F.3d at 720. The scope of the waiver is to be determined by the court, and tailored
17 to the universe of facts placed in issue by the claim and by respondent’s claim-specific needs for
18 information. Accordingly, the waiver issue cannot be decided outside the context of specific
19 requests for discovery.

20 In Section 2255 proceedings, a party is not automatically entitled to discovery;
21 rather, a party requesting discovery must show good cause. Rule 6(a), Fed. R. Governing
22 Section 2255 Proceedings. Furthermore, “[a] party requesting discovery must provide reasons
23 for the request. The request must also include any proposed interrogatories and requests for
24 admissions, and must specify any requested documents.” Rule 6(b), Rules Governing Section
25 2255 Proceedings. When discovery of attorney-client communications or attorney work-
26 product is authorized, a narrowly-drawn protective order is required. Bittaker, 331 F.3d at 720-

1 25.

2 If the government wishes to discover specific information, it must submit a
3 request for discovery complying with Rule 6 of the Rules Governing Section 2255 Proceedings.
4 The issue of waiver will be addressed only in relation to specific requests for discovery.

5 B. Appointment of Counsel

6 In his motion filed November 16, 2012, movant seeks appointment of counsel on
7 the grounds that the issues in this case are complex, movant lacks legal training, and movant will
8 require an experienced advocate to comply with the procedural rules for habeas corpus.

9 Appointment of counsel is mandatory pursuant to Rule 8(c) of the Rules
10 Governing § 2255 Cases when an evidentiary hearing is required, United States v.
11 Duarte-Higareda, 68 F.3d 369 (9th Cir. 1995), and when necessary for effective discovery
12 pursuant to Rule 6(a) of the Rules Governing § 2255 Cases. At this early juncture, neither are
13 required. Although Rule 6(a) permits appointment of counsel for the limited purpose of
14 conducting discovery, appointment of counsel is not necessary for the parties to conduct
15 effective discovery. Appointment is also required when the complexities of the case are such
16 that lack of counsel would equate with the denial of due process. Brown v. United States, 623
17 F.2d 54, 61 (9th Cir. 1980) (citing Dillon v. United States, 307 F.2d 445, 446-47 (9th Cir.
18 1962)). There is presently no indication that lack of counsel would result in the denial of due
19 process.

20 Otherwise, the court must determine whether the interests of justice require the
21 appointment of counsel. Terrovona v. Kincheloe, 912 F.2d 1176, 1181 (9th Cir. 1990) (quoting
22 18 U.S.C. § 3006A(a)(2)(B)). This determination is guided by an assessment of petitioner's
23 ability to articulate his claim, the complexity of the legal issues, and the likelihood of success on
24 the merits. Weygandt v. Look, 718 F.2d 952, 954 (9th Cir. 1983) (per curiam). Petitioner has
25 articulated his claims well and the legal issues are not inherently complex. At this time, the
26 court will deny his request without prejudice to renewal should circumstances change.

1 C. Petitioner's Motion for Leave to Conduct Discovery

2 Petitioner also seeks leave of court to submit requests for production of
 3 documents to the United States Attorneys' Office to produce (a) all statements made by
 4 witnesses appearing at trial on behalf of the government; (b) all correspondence between defense
 5 counsel and the government relating to discovery issues, Brady¹ documents, and plea offers and
 6 proposed agreements; and (c) all documents from government witnesses related to petitioner's
 7 alleged claim to be a Sovereign Citizen and all documents related to the belief allegedly held by
 8 Sovereign Citizens that the laws of the United States or any State do not apply to them.

9 Petitioner asserts that he intends to use this information in support of his claim
 10 that the prosecutor committed Brady error and in support of his claims of ineffective assistance
 11 of counsel. Review of petitioner's Section 2255 motion reveals that petitioner has not asserted a
 12 Brady claim. Furthermore, petitioner has failed to articulate how the documents sought relate to
 13 his ineffective assistance of counsel claim. Under Rule 6(a) of the Rules Governing Section
 14 2255 Proceedings, courts may authorize parties to a Section 2255 habeas proceeding to conduct
 15 discovery for good cause shown. Good cause under Rule 6(a) exists "where specific allegations
 16 before the court show reason to believe that the petitioner may, if the facts are fully developed,
 17 be able to demonstrate that he is . . . entitled to relief" Bracy v. Gramley, 520 U.S. 899,
 18 908-09 (1997).

19 Here, petitioner first seeks copies of the statements made by government
 20 witnesses to determine whether his trial counsel was aware of these statements. Yet other than
 21 petitioner's conclusory allegations, petitioner has provided no reason for the court to infer that
 22 trial counsel did not in fact review these statements. Habeas petitioners may not "use federal
 23 discovery for fishing expeditions to investigate mere speculation." Calderon v. U.S. Dist. Court,
 24 98 F.3d 1102, 1106 (9th Cir. 1996).

25
 26 ¹ Presumably, petitioner is referring to Brady v. Maryland, 373 U.S. 83 (1963).

1 Next, as to petitioner's request for production of all correspondence,
2 communications, email and notes between defense counsel and the government relating to
3 discovery issues, Brady documents, and plea offers and proposed agreements, petitioner admits
4 that he has received some of this material from his trial counsel. Petitioner, however, does not
5 specify which materials remain outstanding or even why such expansive discovery is necessary.
6 Petitioner's request is a classic fishing expedition, resembling that of the petitioner in Sherman v.
7 McDaniel, 333 F. Supp. 2d 960 (D. Nev. 2004), a 28 U.S.C. § 2254 case. There, the court found
8 that the petitioner was seeking "to justify this broad discovery by describing an array of claims
9 of ineffective assistance of counsel." Sherman, 333 F. Supp. 2d at 973. The court concluded:

10 For the most part, at the heart of these claims, petitioner essentially asserts that his
11 trial counsel unreasonably failed to seek the discovery that petitioner seeks now.
12 If not more than that were required for a showing of good cause under Bracy,
habeas petitioners would have a free pass to conduct any discovery remotely
related to their case.

13 Id. at 974-75.

14 Finally, petitioner's request for documents as related to Sovereign Citizens will be
15 denied. Any information concerning petitioner's alleged claim to be a Sovereign Citizen and his
16 corresponding beliefs should either be in the record or known personally to petitioner. As to the
17 remaining requests regarding the general beliefs of Sovereign Citizens, the court can discern no
18 need for the government to provide petitioner with this background information.

19 For the foregoing reasons, IT IS HEREBY ORDERED that:

20 1. The government's request for a finding of waiver of attorney-client privilege is
21 denied without prejudice to renewal in a motion for discovery filed in accordance with Rule 6 of
22 the Rules Governing Section 2255 Proceedings;

23 2. Petitioner's November 16, 2012 motion for appointment of counsel is denied
24 without prejudice; and

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3. Petitioner's November 16, 2012 request for discovery is denied.

DATED: January 9, 2013.


ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE

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